THE JUSTICIABILITY OF INTERNATIONAL DISPUTES[1]

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The appalling record of the past year and a half ought to make us, interested in international law, extremely modest. Professing that we expound international law as it is, we have been deluding ourselves and really setting forth international law as we believed that it ought to be. The universal bankruptcy of normal international relationships has shown to us how great a gap there is between that which we had conceived to be and that which really exists. Many of the foundations of international law we now see to have rested upon a conception of international society which did not really obtain. Perhaps, too, although professing contact with the actual, we have been living in an unreal world, a world wherein the ideal was given a much wider range and play than we were justified in believing. Any attempt to reconstruct the formal bases of international law—and such reconstruction must be made—must take account not only of the experiences of the present war, but of the long series of half-submerged elements which led to the present disaster almost with the inexorability of the forces of natural law. Shocked and benumbed as we are by the constant revelations of horror in these past months, there is also the awful realization that, after all, what has taken place has been largely the result of factors seemingly without immediate human direction.

Any plan for a permanent peace, and for the amicable settlement, after this war is over, of disputes between states, must take into consideration these facts and look at international society not as we have looked at it, as a static condition of man-

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kind, but as one in which there are dynamic factors too vast and intricate for any decisive plan adequately to include and reckon with all the circumstances. These dynamic factors have to do not only with the relations of states with each other, a subject to which international law in the past has confined itself, but with the larger relations of groups to groups both within and without states, of individuals to individuals, of world movements of population, of earth-hunger and its appeasement, and of the strivings of international commercial competition. These things must be reduced to the régime of law, to an acceptance of a universal *status quo;* and in the past this has never come about except under a universal imperial dominion, or world-state.

Slowly and painfully must the edifice be reconstructed, from foundation to superstructure. The basis of a régime of law among states must be those really juristic principles, recognized by the members of the world-society as not repugnant to the realization of national ideals on the one hand, and on the other as fitting in with the generally accepted ideals of justice and of fair dealing on the part of peoples within a state.

Such a limitation may seem highly reactionary, and to run counter to the accepted theories of international law; but, if you will permit it, international law has been in the past something of an esoteric science. The formal elaboration of its principles has been made too often by those who have not only an idealistic conception of world-relationship, but by those who have from their position had too little contact or even sympathy with the actual conditions of popular life. After all, international law has been written and to a large extent been put into effect by those having the aristocratic point of view. The determination of the foreign policies of a state has never been—perhaps cannot as yet be—fixed by popular methods.

What parts of international law can properly be claimed to fall within the limits just set forth? Can we include what have been called for centuries the primordial or absolute rights of states? An international law built upon these principles connects at once with the absolutist theory of the state, makes

world-society simply the sum of the relationships between primordial units, and has little to do with what lies back of and within such units. It makes such units equal with each other in legal rights and legal duties. It stresses absolute independence, together with a theory of sovereignty associated with the organic theory of the state. At certain periods in the development of the world such a group of conceptions makes for progress. At other periods it makes for reaction, just as the doctrine of natural rights was revolutionary in 1776 and 1789, and has become reactionary under a newer theory of social justice.

The doctrine of natural rights within the state cannot be eliminated. It must be restated. A natural right today we conceive to be one which society guarantees to the individual, not merely that he be protected in a fixed sphere of action, but because by such guarantee to the individual the rights of the whole are best preserved and protected. In like manner the traditionally primordial rights of states must in time be re-stated, not in terms of the state, but in terms of humanity and of a world-society. The state, according to such a theory, is to be protected in its international legal rights and duties not in order to guarantee its existence as an end in itself. It is protected in order that the good of the whole of humanity and civilization may be advanced.

If this statement be correct, then we must recreate and reconstruct the doctrines of independence and equality if not in the light of pragmatism at least in terms of social dynamics. The theoretical position of sovereignty within the state must be attacked anew, even if it include a reconsideration of the conception of the state as modified by the various factors which give it existence. We are met at the outset with the objection that such a doctrine does not square with the facts of actual world-life. Perhaps not as yet; but it is incontestably true that the formal bases of Grotian International Law do not accord with the actualities of twentieth century world-life.

International law has been traditionally defined as the body of rules which states habitually observe in their mutual dealings. This definition raises the question: Why are certain rules habitu-

ally recognized? Why habitually? Because, in the first place, such rules are assumed to fit the ideals of international conduct ingrained in the habits of civilized mankind generally; and secondly, that such common ideals do not run counter to the policies of states in their ordinary mutual relationships. The observance of international law, after all, we must confess, depends largely upon national policies. In so far as national policies coincide with certain generally accepted justiciable principles, we have a stable foundation for international law. Where policies intervene we have a situation in which dynamic factors have not yet been resolved, and to that extent the law does not actually exist. To illustrate: the doctrine of the equality of states is not effective under any principles of policy such as that built up under the doctrine of balance of power. In strict law one state has the right to sell territory to another and to put, after such cession, the other power into possession. Yet there are few quarters of the globe where such a legal right can be exercised. The legal right, let us say, of Denmark to sell its West Indian possessions. and to put the vendee into possession is unquestioned. That the policy of the United States would interdict such a transfer is equally apparent. As to the universal validity, therefore, of this elementary legal right, the United States is not in accord. And here we get at the essential difference between justiciable and non-justiciable controversies in international law.

The term justiciable has been made use of in English for many centuries and it usually carries with it the idea of a court proper to settle controversies. The jurisdictional idea is paramount. Now the creation of a court and the setting up of its jurisdiction is, to that extent, a recognition of a juristic status quo. Such a conception was conspicuously absent from the federal court of appeals under the articles of confederation. The notion that legal coercion is inseparably connected with the life and vigor of a court means acceptance, voluntary or forced, by the peoples over whom the jurisdiction is given, of a juristic status quo. The setting up of a court and the giving to it of jurisdiction mean the possession, by the parties under the jurisdiction of

the court, of common legal conceptions and principles, at least for the purpose of maintaining the jurisdictional efficacy of such a court.

International relationships must rest, as was recently said by our distinguished secretary of state, upon a common regard for law and humanity. Without such an acquiescence on the part of the governments of states in the principles of law and humanity, no international court can be effective. There must, however, be not merely a passive acquiescence in such principles by the peoples of the various countries whom the governments merely represent, but an aggressive belief in such principles which if need be may be translated into action. The provision in international arbitration treaties, that questions vitally affecting the honor of the independence of states are not subject to arbitration, although frequently criticised in the past, is seen after all to rest upon a profound psychological basis. Upon such questions there is not yet a common factor of legal ideas sufficiently in harmony with common national policy, to the extent that any real justiciability is possible.

An illustration of this may be seen in two incidents described by Mr. Thayer in his recent life of John Hay. The first is the attitude of Mr. Roosevelt toward Germany's alleged aggressions against Venezuela following upon the so-called pacific blockade of 1902. Germany was forced by the United States, it is said, to arbitrate the question of her claims against Venezuela. Certainly it would seem that these claims were properly justiciable in a court of arbitration, and a precedent for forcing such settlement was found in President Cleveland's policy towards Great Britain in 1895. On the other hand, President Roosevelt, assuming that the claim of the United States with reference to the Alaska boundary was eminently proper and just, is said to have served notice upon Great Britain that in certain contingencies the United States would refuse to arbitrate the boundary question and would proceed to draw a line for itself.

Both questions were properly justiciable and yet in both cases the underlying reasons why arbitration was had were kept concealed from the public. That the United States was eminently

successful in both as a matter of policy is proved by the result; but that the peoples of the countries concerned were educated to a more rational method for the settlement of international differences may well be doubted. The refusal of Germany to arbitrate, and the refusal of Great Britain to accede to our method of arbitration, might conceivably have resulted in a check to the attainment of the policies of the United States, and in a great retardation in the acceptance of the principles of international arbitration. If so, we should have had a breach between this country and the nations mentioned which would have been justified on the grounds of American policy. Popular approval would then have been sought not so much for the purpose of justifying international arbitration as a principle, but to maintain what was assumed to be the paramount rights of the United States in the western hemisphere. This is said not with the idea that the policy of maintaining such a position by the United States is inherently wrong, but to suggest that what made the disputes really justiciable was not in any sense based upon a popular demand for arbitration, but because the policy of the United States happened to harmonize with the narrower legal considerations.

The earlier case, when President Cleveland demanded that Great Britain arbitrate the Venezuela boundary, still more clearly illustrates the difference between a popular demand for a legal settlement of an international dispute and the popular approval of American policies. That Mr. Cleveland's aggressive attitude with reference to Great Britain and its refusal to arbitrate the Venezuela boundary controversy was popularly acclaimed in this country, there can be no doubt; but popular enthusiasm was aroused for the support of a national policy irrespective of the demand for arbitration which the policy attempted. We cannot truthfully say that popular opinion in this country can be aroused with reference to any particular method of settling international disputes. It can, however, under skillful direction, be aroused for the support of policies which the government of the Unites States assumes with reference to any foreign power. This we may deplore, but we must recognize that such

is the fact. These illustrations, it is believed, show how far, even in a democratic republic like our own, we are from an acquiescence, governmental or popular, in a general international legal status quo.

It has been suggested that the United States supreme court, with its jurisdiction over controversies among States, offers a pattern for a possible world court wherein all matters of international differences may be decided. Assuming that such a world court could have the coercive power of a league to enforce peace, guaranteed by the countries of the world, it would still lack the important basis which the United States supreme court has in its jurisdiction over state controversies. When a State is admitted into the Union, it is admitted upon a plane not only of legal, but also of a certain political, equality with other States. No such thing is possible as the aggression of one State upon another with reference to territory, or commerce, or the movements of population. In other words, the admission of a State into the Union proceeds upon the recognition of the great constitutional status quo.

Any plan for a world court, backed by a league to enforce peace, must proceed upon the theory of an accepted status quo not only with reference to the legal relations of states with each other, but with reference to the conditions within states, governmental and political. The map of the world must be fixed as the map of the United States within its boundaries is fixed. Things as they are, or as they will be when such a plan is put into effect, must be taken as the basis for all time to come. *De facto* states will be *de jure* states; *de facto* governments, *de jure* governments—to reverse the principles of the Holy Alliance, which is the attempt in history most nearly akin to the one suggested.

If there be controversies among the States of the union which are not justiciable, it is hard to conceive of them since the civil war. The position of the State in the Union is fixed; and at all points, at least so far as its relations with other States are concerned, which might lead to aggression, it is susceptible of some kind of legal coercion. If we conceive of the question of seces-

sion as in the nature of a controversy between States, such a controversy was not justiciable. Not being justiciable, the present status quo was reached by war.

The range of justiciability with reference to controversies between the states of the world is limited, then, by the common factor of juristic principles common to all civilized peoples and accepted by the governments of such peoples as in harmony with their state policies. That this range can be of but slow growth must be admitted. At present it would seem that the so-called international mind no longer exists. If the present war is productive of any good, it must be in the creation of a new international mind, based not upon an unanimity of expression by the governments of states, but by the common convictions of a militant humanity.

The comparatively small number of the subjects of international law hinders rather than advances the range of international justiciability. A norm of law is most easily ascertained when it affects a great mass of legal subjects. When the parties to international relationships number but half a hundred, the usual rarely occurs, the unusual dominates. Within a state the greatest validity is given to a rule of action when that rule is applicable to and adopted by a great mass of legal subjects. Only out of such a scheme does a true norm of law proceed; and in the long run the sanction of a rule of municipal law is most potent when the rule attaches to the greatest number of legal subjects.

It is in connection with this idea that the relative inefficacy of law-making treaties is to be ascribed. What Savigny a century ago so pertinently described as the proper basis of the codification of municipal law—a long period of development of common legal interests and ideas—founded upon a conscious national solidarity—should be considered with reference to international law. The so-called great international law-making treaties are at the present time but monuments of more or less benevolent aspirations. Like laws adopted by a state in unmindfulness of actual conditions or of the legal prepossessions of a people, many international statutes have broken down because

they did not express the common fund of ideas with respect to international life. Take, for instance, the Hague convention with reference to the inviolability of neutral territory. That convention was ratified by the Senate of the United States and is now the supreme law of the land. Yet who can seriously maintain that the world or even the United States is educated up to the militant acceptance of such a general principle?

Again, geographical factors reduce the range of justiciability of international disputes. The influence of these factors upon international law is incomparatively greater than ordinarily one is led to believe. We must face the fact that the old idea of eternal principles of international law, valid *quod semper, quod ubique, quod ab omnibus*, is modified by the specific situations of the various countries of the world. To admit that such factors wholly prevail over the rules is to deny that international law exists; but that geographical factors do modify these rules is never more evident than it is during war. The peculiar situation of the West India Islands with reference to the United States, of Portuguese Southeast Africa to the Boer republics, of the Scandinavian countries and Holland to Germany—these actually modify what otherwise might be considered as universal principles; and the extent to which this modification takes place practically limits the range of justiciable methods in the settlement of international disputes.

Finally, there must be recognized what may be called the sphere of an international law of crime. It is possible that in combating Austin's doctrine that international law is not true law, we are in danger of neglecting what he claimed for it, a positive international morality. Such an attitude is more likely as long as international law is based upon a political philosophy which sets forth the state as a person essentially non-moral. Acts which shock the most obvious claims of humanity come to be looked at not as international crimes but as international torts to be adjusted through diplomatic apology and assuaged by money payment. Anything whether in the form of certain kinds of pacificistic propaganda or in the smugly polished phrases of diplomatic utterance, which glosses over the essen-

tially anti-social and therefore criminal nature of certain international acts may contribute to a fatal confusion of ideas. This among a people already far too regardless of the value of human life may dull its sensibilities, weaken its moral fibre, and destroy its desire and ability to defend those things which are of greatest value to civilization and society.

If what has been said is regarded as a confession of failure, I shall feel that it has been said to no purpose. My idea is rather that we must, as interested in a noble science, take account of things as they actually are and realize that the international law of the future cannot be founded upon the one and single principle of state personality; but that it will rest, upon the slow and painful accumulations of experience; not that it should depend upon diplomatic opportunism alone, but upon the wider principles of human kinship and of humanity; that international law after all, to be a valid law among states, cannot be merely the idealistic portrayal of the philosophic jurist or of the policy of expediency adopted by the bureaucrat. It may be that the state is but a passing phenomenon. It must be that the theory of the state as a juristic person must be re-examined in terms of humanity. Until this is done the prospects of the future in the way of the settlement by legal methods of all or even the more important international disputes cannot be predicted with anything like confidence.